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April 16, 2012

**Via Electronic Filing**

Hon. Andrew T. Baxter, U.S. Magistrate Judge  
USDC - Northern District of New York  
James Hanley Federal Building, 3<sup>rd</sup> Floor Chambers  
100 South Clinton Street  
Syracuse, New York 13261-7367

**Re: *Johnson v. Wave Comm GR LLC, et. al.,***  
**Civil Case No.: 6:10-cv-0346**

Dear Magistrate Judge Baxter:

As the Court is aware, this lawsuit concerns claims for overtime wages under the Fair Labor Standards Act (hereinafter "FLSA") and the New York State Labor Law by past and present employees of Wave Comm GR, LLC (hereinafter "Wave Comm"). During the course of this litigation, approximately seventy (70) individuals have consented to join this lawsuit by filing an "opt-in" notice with the Court as required by 29 U.S.C. § 216(b) (hereinafter referred to as "opt-in Plaintiffs"). Thus, the opt-in Plaintiffs specifically elected to be parties to this proceeding and are, therefore, required to participate in all phases of the case including discovery.

During discovery, Defendants served discovery demands upon Plaintiffs including a demand for the production of documents and two (2) sets of interrogatories. Thirteen opt-in Plaintiffs failed or refused to provide responses to Defendants' discovery demands. As a result, Defendants: (1) requested and attended a conference with the Court to discuss the issue (Dkt. No. 111); (2) requested and received leave to file a motion seeking an order to compel responses to Defendants' discovery by the thirteen non-responsive opt-in Plaintiffs (Dkt. No. 112); (3) received an Order from the Court compelling discovery responses (Dkt. No. 115); (4) received no responses from the thirteen non-responsive opt-in Plaintiffs following the issuance of the Court's Order to Compel (Dkt. No. 122-1, ¶ 5); (5) filed a motion pursuant to Fed. R. Civ. P. 37 seeking the dismissal of the opt-in Plaintiffs claims (Dkt. No. 122); and (6) received an Order from Judge Hurd granting and dismissing the claims of thirteen (13) opt-in Plaintiffs under the FLSA for their failure or refusal to participate in discovery (Dkt. Nos. 127, 144).

Thus, as this case currently stands, there are fifty-seven (57) opt-in Plaintiffs. As the Court is aware, Plaintiffs' counsel recently sought permission to withdraw as attorneys for opt-in Plaintiff Gary Czelusniak (Dkt. No. 140). According to Plaintiffs, opt-in Plaintiff Czelusniak

responded to Defendants' First Set of Interrogatories and produced documents responsive to Defendants' First Set of Requests for Production of Documents, but has not responded to Plaintiffs' counsel's communications regarding Defendants' Second Set of Interrogatories, which were served in May 2012 (Dkt. No. 140-3, ¶¶ 8-9). Plaintiffs' counsel claims that between July, 2012, and October, 2012, they attempted to contact Plaintiff Czelusniak twenty-six (26) separate times by phone, letter, and email about providing a response to Defendants' discovery demands, but did not receive a response (Dkt. No. 140-3, ¶ 9). As a result, on March 28, 2013, the Court issued an Order granting Plaintiffs' counsel's motion to withdraw as attorneys for unresponsive opt-in Plaintiff Czelusniak (Dkt. No. 148). Thus, opt-in Plaintiff Czelusniak is now a *pro se* party to this action who remains obligated to respond to Defendants' discovery demands, but has yet to provide a response.

In view of the foregoing, Defendants intend to seek permission to file a motion for an order to compel Plaintiff Czelusniak to respond to Defendants' discovery demands pursuant to Fed. R. Civ. P. 37(a)(3)(B) and, in the event that he fails to respond, request an order from the Court dismissing his FLSA claims pursuant to Fed. R. Civ. P. 37(b)(2)(A)(v). Due to the fact that this issue previously has been addressed by the Court as described above, Defendants respectfully request the following relief from the Court: (1) permission to forgo holding a pre-motion conference as required by Northern District Court Local Rule 7.1(b)(2); and (2) permission to file a non-dispositive motion seeking an order to compel a response from opt-in Plaintiff Czelusniak to Defendants' Second Set of Interrogatories pursuant to Fed. R. Civ. P. 37(a)(3)(B). Prior to seeking this relief from the Court, we communicated with Plaintiffs' counsel who has no objection to either request.

To the extent that the Court has any questions or concerns with respect to any of the foregoing, we remain available to the Court.

Respectfully submitted,

GIRVIN & FERLAZZO, P.C.

By:   
Scott P. Quesnel

SPQ/arcl

cc: Tim Selander, Esq. (via ECF)